Hari Bahadur Ghale v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–351 OF 2009
HASAN LAH, ABDUL MALIK ISHAK AND AHMAD MAAROP JJCA
3 JUNE 2011

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Whether trial judge erred in finding prosecution made out prima facie case against appellant — Whether evidence of agent provocateur credible and sufficient to support charge of trafficking — Whether prosecution proved charge against appellant beyond reasonable doubt — Whether trial judge correct in rejecting appellant's defence — Dangerous Drugs Act 1952 s 39B

Criminal Procedure — Appeal — Fact, finding of — Appellant's conviction based on evidence of agent provocateur — Appellate interference — Audio-visual advantage — Whether appellate tribunal should interfere with finding of fact — Whether there were appealable errors

Evidence — Witness — Credibility — Agent provocateur — Whether evidence of agent provocateur had to be corroborated — Whether statement made by appellant to agent provocateur admissible — Whether evidence of agent provocateur credible and sufficient to support charge of trafficking — Dangerous Drugs Act 1952 ss 40 & 40A

Evidence — Witness — Failure to call witness — Whether failure warranted adverse inference being drawn against prosecution

The Drug Enforcement Agency of Kuala Lumpur ('the DEA KL') invited one Menash Marlon Carl ('SP4'), who was working with a drug enforcement agency of the US with its headquarters in Bangkok, Thailand to come to Kuala Lumpur ('KL') to tackle the drug problems in KL. While in KL, SP4 posed as an agent provocateur and was under the direct supervision of a special agent of DEA KL by the name of Sithik Sar (SP5). After a meeting with Hari Bahadur Ghale ('the appellant') and another ('the second accused') SP4 discovered that the appellant was a drug trafficker. Thereafter SP4, SP5 and the head of the narcotics division in Kuala Lumpur, ACP Kang ('SP6'), conceived a plan to lure the appellant to sell drugs to SP4 who had already introduced himself to the appellant as a drug trafficker and had indicated his intention to purchase drugs. The appellant agreed to sell the equivalent of 1.2kg of heroin (a

dangerous drug) to SP4 at the price of USD22,000 per kg. It was also agreed that they would use room 1109 of the Federal Hotel (room 1109) as the location where the sale and purchase transaction would take place. SP6 arranged for the booking of room 1109 and two other rooms to supervise the transaction as well as to locate the police personnel before the ambush took place. As according to the plan, on 30 May 2003 at about 1pm, SP4 and the appellant met at a restaurant opposite the Federal Hotel and made their way to room 1109. The appellant came without bringing the supply of drugs but while they were in room 1109, he received a call that his friend had arrived with the drugs. The appellant then left the room and arrived shortly together with the second accused carrying four plastic bags that contained a white powdery substance. After SP4 was satisfied as to the authenticity of the white powdery substance in the plastic bags as heroin he made a telephone call to SP6 to bring the money in cash. That telephone call, which was in effect the signal for the police party to enter room 1109, led to the ambush party entering room 1109 and arresting the appellant and the second accused. The contents of the four plastic bags were later analysed by a government chemist and confirmed to be 875.2g of heroin. The appellant and the second accused were charged with trafficking in 875.2g of heroin under s 39B(1)of the Dangerous Drugs Act 1952 ('DDA')). At the close of the prosecution case the trial judge found that a prima facie case had been made in respect of the charge and ordered the appellant and the second accused to enter their defence. The appellant and the second accused claimed that they had not brought the heroin or any other drugs into room 1109 and that they had not sold any dangerous drugs to SP4, the agent provocateur. According to them the said drugs had been brought into room 1109 by two others. It was both their defence that they had gone to room 1109 to meet SP4 for the sole purpose of exchanging foreign currencies with Malaysian Ringgit. The trial judge rejected the defence of the appellant and the second accused and found them guilty of trafficking. Both accused were convicted and sentenced to death. This was their appeal against conviction and sentence. However, as the second accused died in prison while waiting for his appeal to be heard, his appeal was dismissed and the instant appeal was only concerned with the present appellant. In this appeal the appellant submitted, inter alia, that the trial judge had erred when he held that the prosecution had made out a prima facie case against the appellant when the evidence of SP4 was weak; that there was evidence corroborating the evidence of SP4 when in reality there was no such corroborative evidence; and that the prosecution had established its case beyond reasonable doubt.

Held, dismissing the appeal:

(1) Any statement made by the appellant to SP4 would be admissible at the trial as there was no requirement for the evidence of SP4 as an agent provocateur to be corroborated. As such, the trial judge was correct in holding that the evidence of SP4 could stand alone without any

corroboration. In the present appeal SP4's evidence was sufficient to establish the fact that the appellant trafficked in the dangerous drugs. SP4 gave the signal for the police party to enter room 1109 and effect the necessary arrest. At this juncture, the evidence of SP4 pertaining to what had transpired before, during and after the arrest of the appellant and the second accused must be taken to be credible pursuant to s 40A of the DDA. Further the trial judge also found that the evidence of SP4 was corroborated by other prosecution witnesses, such as SP5 and SP6 as well as by the exhibits (paras 45–50, 89 & 90).

(2) Based on the evidence it was found that the trial judge was right in rejecting the appellant's defence. The appellant's defence that the drugs were brought into room 1109 by two others could not stand. At the time of the arrest at room 1109, not a single prosecution witness testified that these two were present. The trial judge also rightly rejected the appellant's contention that he had gone to room 1109 to exchange foreign currencies since the monies found on the persons of the appellant and the second accused were too little to warrant such a suggestion. Hence the trial judge was correct in finding that the appellant had failed to raise any reasonable doubt as to his guilt (see paras 51–57, 91).

(3) There was no legal impediment in convicting the appellant on the sole testimony of a single witness such as SP4, when that witness was an agent provocateur. Upon carefully scrutinising the evidence of SP4 it was found that there was overwhelming evidence to establish a prima facie case against the appellant. From the factual matrix, the irresistible inference that could be drawn from the totality of evidence at the prosecution's stage was that both the appellant and the second accused were selling the drugs for the purpose of trafficking in it and a prima facie case had been made out for trafficking. Hence the appellant's submission that the prosecution had not made out a prima facie case against him must fail. (see paras 64 & 88).

(4) It was trite law that the prosecution had the discretion as to whether or not to call any particular witness especially when it did not believe that witness to be a witness of truth. Thus, the appellant's submission to invoke an adverse inference against the prosecution for its failure to call certain witnesses could not stand. It was found that the prosecution had called all the necessary witnesses to unfold the story upon which its case was based (see paras 103–108, 110).

(5) This appeal turned upon a finding of fact by the trial judge and the audio-visual advantage enjoyed by the trial judge could not be enjoyed by this court. There were also no appealable errors. Thus, as an appellate tribunal this court would be slow in interfering with a finding of fact of the trial judge (see paras 111–118).

[Bahasa Malaysia summary

Agensi Penguatkuasaan Dadah Kuala Lumpur ('APD KL') menjemput Menash Marlon Carl ('SP4'), yang bekerja dengan agensi penguatkuasaan dadah US yang beribu pejabat di Bangkok, Thailand datang ke Kuala Lumpur ('KL') untuk mengatasi masalah dadah di KL. Semasa di KL, SP4 menyamar sebagai ejen perangkap dan diselia secara langsung oleh ejen khas DEA KL, Sithik Sar ('SP5'). Selepas pertemuan dengan Hari Bahadur Ghale ('perayu') dan seorang lain ('tertuduh kedua') SP4 mendapati bahawa perayu merupakan pengedar dadah. Kemudiannya, SP4, SP5 dan ketua bahagian narkotik KL, ACP Kang ('SP6'), membuat suatu rancangan untuk mengumpan perayu menjual dadah kepada SP4 yang telahpun memperkenalkan dirinya kepada perayu sebagai seorang pengedar dadah dan telah menyatakan niatnya untuk membeli dadah. Perayu bersetuju untuk menjual 1.2kg heroin ('dadah berbahaya') kepada SP4 pada harga USD22,000 sekilogram. Juga telah dipersetujui bahawa mereka akan menggunakan bilik 1109 Hotel Federal ('bilik 1109') sebagai lokasi transaksi jual beli. SP6 membuat tempahan bilik 1109 dan dua lagi bilik untuk mengawasi transaksi tersebut dan untuk menempatkan pegawai polis sebelum serbuan dibuat. Seperti yang telah dirancangkan, pada 30 Mei 2003 lebih kurang jam 1 petang, SP4 dan perayu bertemu di restoran berhadapan Hotel Federal dan menuju ke bilik 1109. Perayu datang tanpa membawa sebarang bekalan dadah tetapi apabila mereka di dalam bilik 1109, dia menerima panggilan menyatakan kawannya telah datang membawa dadah bersamanya. Perayu kemudiannya meninggalkan bilik tersebut dan kemudiannya tiba semula bersama tertuduh kedua dengan membawa empat beg plastik yang mengandungi bahan serbuk keputih-putihan. Setelah SP4 berpuas hati atas ketulenan bahan serbuk keputih-putihan dalam beg-beg plastik tersebut adalah heroin, dia menelefon SP6 agar membawa wang tunai. Panggilan telefon tersebut, yang sebenarnya merupakan isyarat bagi kumpulan polis memasuki bilik 1109, menyebabkan kumpulan serbuan memasuki bilik 1109 dan menangkap perayu dan tertuduh kedua. Isi kandungan keempat-empat platik beg kemudiannya dianalisa oleh ahli kimia kerajaan dan disahkan 875.2g heroin. Perayu dan tertuduh kedua dituduh dengan mengedar 875.2g heroin di bawah s 39B(1) Akta Dadah Berbahaya 1952 ('ADB'). Di penutupan kes pendakwaan, hakim bicara mendapati bahawa kes prima facie berjaya dibuktikan terhadap tuduhan dan memerintahkan perayu dan tertuduh kedua membela diri. Perayu dan tertuduh kedua mendakwa bahawa mereka tidak membawa heroin atau dadah lain ke bilik 1109 dan mereka tidak menjual apa-apa dadah berbahaya kepada SP4, ejen perangkap itu. Menurut mereka, dadah tersebut dibawa masuk ke bilik 1109 oleh dua orang lain. Pembelaan kedua-dua mereka ialah mereka masuk ke bilik 1109 untuk berjumpa SP4 semata-mata untuk membuat pertukaran wang asing dengan Ringgit Malaysia. Hakim bicara menolak pembelaan perayu dan tertuduh kedua dan memutuskan mereka bersalah kerana mengedar dadah. Kedua-dua tertuduh disabitkan dan dihukum hukuman mati. Ini merupakan rayuan mereka

terhadap sabitan dan hukuman. Walau bagaimanapun, tertuduh kedua mati dalam penjara sementara menunggu rayuannya didengar, rayuannya ditolak dan rayuan ini hanya berkenaan perayu ini. Dalam rayuan ini perayu menghujah, antara lain, bahawa hakim bicara telah khilaf apabila beliau memutuskan bahawa pihak pendakwa telah membuktikan kes prima facie terhadap perayu apabila keterangan SP4 lemah, bahawa terdapat keterangan yang menyokong keterangan SP4 sedangkan sebenarnya tiada keterangan sokongan tersebut; dan bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah.

Diputuskan, menolak rayuan:

(1) Sebarang kenyataan oleh perayu yang dibuat kepada SP4 boleh diterimapakai dalam perbicaraan kerana tiada keperluan bagi keterangan SP4 sebagai ejen perangkap perlu disokong. Oleh itu, hakim bicara adalah betul apabila memutuskan bahawa keterangan SP4 adalah kukuh tanpa perlu disokong. Dalam rayuan ini keterangan SP4 cukup untuk membuktikan fakta bahawa perayu mengedar dadah berbahaya. SP4 memberi isyarat kepada pihak polis untuk memasuki bilik 1109 dan membuat tangkapan. Pada ketika ini, keterangan SP4 berkenaan apa yang berlaku sebelum, semasa dan selepas penangkapan perayu dan tertuduh kedua mestilah diambilkira sebagai boleh dipercayai berikutan s 40A ADB. Selanjutnya, hakim bicara juga mendapati bahawa keterangan SP4 disokong oleh saksi-saksi pendakwaan yang lain seperti SP5 dan SP6 dan begitu juga dengan ekshibit-ekshibit (lihat perenggan 45–50, 89 & 90).

(2) Berdasarkan keterangan tersebut, didapati hakim bicara membuat keputusan tepat dalam menolak pembelaan perayu. Pembelaan perayu bahawa dadah itu dibawa ke dalam bilik 1109 oleh dua orang lain tidak kukuh. Pada masa penangkapan dalam bilik 1109, tiada seorang pun saksi pendakwaan memberi keterangan bahawa orang lain tersebut ada. Hakim bicara juga membuat keputusan tepat apabila menolak hujahan perayu bahawa dia telah pergi ke bilik 1109 untuk menukar wang asing kerana wang yang dijumpai pada perayu dan tertuduh kedua sangat sedikit bagi mengesahkan cadangan tersebut. Oleh itu hakim bicara betul apabila membuat keputusan bahawa perayu telah gagal membangkitkan apa-apa keraguan munasabah tentang kebersalahannya (lihat perenggan 51–57, 91).

(3) Tiada halangan undang-undang dalam mensabitkan perayu hanya dengan satu saksi seperti SP4, apabila saksi tersebut merupakan ejen perangkap. Setelah meneliti keterangan SP4, didapati bahawa tiada keterangan yang mampu membuktikan kes prima facie terhadap perayu. Daripada matriks faktual, inferens yang jelas yang boleh dibuat daripada keseluruhan keterangan pada peringkat pendakwaan ialah perayu dan

tertuduh kedua menjual dadah tersebut bagi tujuan mengedar dan kes prima facie telah dibuktikan untuk pengedaran. Oleh itu, hujahan perayu bahawa pendakwaan tidak membuktikan kes prima facie terhadapnya harus gagal (lihat perenggan 64 & 88).

(4) Menjadi undang-undang tetap bahawa pendakwaan mempunyai budi bicara sama ada mahu memanggil mana-mana saksi terutamanya apabila ia tidak percaya bahawa saksi tersebut adalah saksi jujur. Maka, hujah perayu untuk menggunakan inferens bertentangan terhadap pendakwaan atas kegagalannya memanggil saksi-saksi tertentu tidak kukuh. Didapati bahawa pendakwaan telah memanggil kesemua saksi yang diperlukan untuk membentangkan kisah yang menjadi dasar kes ini (lihat perenggan 103–108, 110).

(5) Rayuan ini berbangkit daripada dapatan fakta oleh hakim bicara dan kelebihan audio-visual yang diperoleh hakim bicara tidak dapat diperoleh mahkamah ini. Juga terdapat kesilapan-kesilapan yang boleh dirayu. Oleh itu, sebagai tribunal rayuan, mahkamah ini agak keberatan untuk campur tangan dapatan fakta hakim bicara (lihat perenggan 111–118).]

Notes

For cases on credibility of witness, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3029–3086.

For cases on fact, finding of, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 439–526.

For cases on failure to call witness, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3135–3145.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (refd)

Adel Muhammed El Dabbah v Attorney-General for Palestine [1944] AC 156 (refd)

AEG Carapiet v AY Derderian AIR 1961 Cal 359 (refd)

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)

Ayoromi Helen v PP [2005] 1 MLJ 699, CA (refd)

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)

Bernard Harry Simmonds, William Holford Barrington-Coupe, Terence William Orwell, Henry Cohen, Hampden Co (Sales) Ltd, Hampden Co (Electronics) Ltd (1967) 51 Cr App R 316 (refd)

Browne v Dunn (1893) 6 R 67 (refd)

Chew Gim Ser v PP [2005] 1 SLR (R) 201, HC (refd)

Chia Sze Chang v PP [2002] 4 SLR 523, HC (refd)
Chua Beow Huat v PP [1970] 2 MLJ 29, HC (refd)
Chua Keem Long v PP [1996] 1 SLR 510 (refd)
Dennis Geoffrey Clarke (1985) 80 Cr App R 344 (refd)
Director of Public Prosecutions v Brooks [1974] 2 All ER 840, PC (refd)
Doyle v Leroux [1981] RTR 438 (refd)
Jeremiah Mealey, Philip Michael Sheridan (1974) 60 Cr App R 59 (refd)
Kevin Fenlon, Raymond Frank Neal, Gary Steven Neal (1980) 71 Cr App R 307 (refd)
Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors [1998] 3 MLJ 457, HC (refd)
Khoon Chye Hin v PP [1961] MLJ 105 (refd)
Khua Kian Keong and another v PP [2003] 4 SLR (R) 526, HC (refd)
Kilari Malakondiaah @ Malayadri & Ors v State of Andhra Pradesh [2009] 1 SC 487 (refd)
Kirpal and others v State of Uttar Pradesh AIR 1954 SC 706 (refd)
Lim Kheak Teong v PP [1985] 1 MLJ 38; [1984] 1 CLJ (Rep) 207, FC (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Maqsoodan & Ors v State of UP, State of UP v Maqsoodan etc AIR 1983 SC 126 (refd)
Megat Halim Megat Omar v PP [2009] 1 CLJ 154 CA (refd)
Michael James McEvilly, Peter John Lee (1973) 60 Cr App R 150 (refd)
Morris v Beardmore [1981] AC 446 (refd)
Mohamad Yazri bin Minhat v Pendakwa Raya [2003] 2 MLJ 241; [2003] 2 AMR 404, CA (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
Munusamy v PP [1987] 1 MLJ 492, FC (refd)
Parkin v Moon (1836) 7 C & P 408 (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
Pichi Muthu, Re [1970] 2 MLJ 143 (refd)
PP v Abang Abdul Rahman [1982] 1 MLJ 346 (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1; [1999] 2 AMR 2017, HC (refd)
PP v Ee Boon Keat [2006] 2 MLJ 633, HC (refd)
PP v Kenneth Fook Mun Lee @ Omar Iskandar Lee bin Abdullah [2007] 1 MLJ 34; [2006] 1 CLJ 499, CA (refd)
PP v Lim Eng Chye [1978] 1 MLJ 200, FC (refd)
PP v Mohamed Halipah [1982] 1 MLJ 155 (refd)
PP v Mohd Fahmi bin Hamzah [2002] 6 MLJ 340, HC (refd)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401; [2002] 3 AMR 3457, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2006] 1 CLJ 457, FC (refd)
PP v Neoh Wan Kee [1985] 1 MLJ 368 (refd)
PP v Nordin bin Johan & Anor [1983] 2 MLJ 221, FC (refd)

PP v Ong Cheng Heong [1998] 6 MLJ 678; [1998] 4 CLJ 209, HC (refd)
PP v Saare Hama & Anor [2001] 4 MLJ 480, HC (refd)
PP v Teh Cheng Poh [1980] 1 MLJ 251 (refd)
R v Baldwin (1925) 18 Cr App R 175 (refd)
R v Bircham [1972] Crim LR 430 (refd)
R v Kalia and Others [1975] Crim LR 181 (refd)
R v Sang [1980] AC 402, HL (refd)
R v Sweet-Escott (1971) 55 Cr App R 316 (refd)
R v Wood Green Crown Court, ex P Taylor [1995] Crim LR 879 (refd)
Rex v Velayuthan [1935] MLJ 277, CCA (refd)
Robert John Maynard, Reginald John Dudley, Charles Edwin Clarke, Kathleen Dudley (1979) 69 Cr App R 309 (refd)
Rosita bte Baharom & Anor v Sabedin bin Salleh [1992] 1 MLJ 379, HC (refd)
Siti Aisha binti Ibrahim v Goh Cheng Hwai [1982] 2 MLJ 124, FC (refd)
Teja Singh & Mohamed Nasir v PP [1950] MLJ 71 (refd)
Toh Ah Loh and Mak Thim v Rex [1949] MLJ 54, CCA (refd)
Vadivelu Thevar v The State of Madras AIR 1957 614, SC (refd)
Walter Berkley Hart (1932) 23 Cr App R 202 (refd)
Winter v Barlow [1980] RTR 209 (refd)
Wong Swee Chin v Public Prosecutor [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Criminal Procedure ss 51A, 180(1)
Dangerous Drugs Act 1952 ss 39B(1), 39B(2) 40A, 40A(1) Part III First Schedule
Dangerous Drugs Law of Jamaica s 7(c)
Evidence Act 1950 ss 114(g) 134,
Indian Evidence Act 1872 [IND] s 134
Penal Code s 34

Rajpal Singh (Musfirah bte Mohd Tahir with him) (Rajpal, Firah & Vishnu) for the appellant.
Ahmad bin Bachik (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant herein was the first accused before the High Court at Kuala Lumpur and he was charged together with another person by the name of Sajan Gurung ('second accused') for trafficking in dangerous drugs, to wit, 875.2g of heroin under s 39B(1) of the Dangerous Drugs Act 1952 ('DDA') read together with s 34 of the Penal Code. At the end of the trial both the appellant

and the second accused were found guilty and they were convicted and sentenced to death pursuant to s 39B(2) of the DDA.

[2] The second accused died in prison while waiting for his appeal to be heard by this court. Consequently, the second accused's appeal was dismissed by this court.

[3] We are only concerned with the appeal of the present appellant herein. But where necessary, reference would also be made to the role played by the second accused in this judgment bearing in mind that the prosecution invoked s 34 of the Penal Code in order to prove the offence of trafficking.

[4] The charge against the appellant and the second accused (since deceased) before the High Court at Kuala Lumpur was worded in this way:

> Bahawa kamu pada 30 Mei 2003 lebih kurang jam 2.00 petang di bilik no: 1109, Federal Hotel, Jalan Bukit Bintang, dalam daerah Dang Wangi, Kuala Lumpur, Wilayah Persekutuan, telah dengan niat bersama mengedar dadah berbahaya iaitu 875.2 gram heroin. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1) Akta Dadah Berbahaya 1952 dibaca bersama seksyen 34 Kanun Kesiksaan dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE FACTS

[5] Mr Mensah Marlon Carl (SP4) worked with a drug enforcement agency of the United States of America with its headquarters in Bangkok, Thailand. SP4 acted as an agent provocateur to gather information and evidence and eventually arrest drug traffickers in Malaysia.

[6] SP4 was invited to come to Kuala Lumpur from Bangkok by the drug enforcement agency ('DEA') of Kuala Lumpur to tackle the drug problems in Kuala Lumpur. SP4 arrived in Kuala Lumpur from Bangkok by air and stayed in a hotel in Kuala Lumpur. SP4 then proceeded to mingle with the crowd in Kuala Lumpur, so to speak.

[7] In Kuala Lumpur, SP4 was under the direct supervision of a special agent of DEA Kuala Lumpur by the name of Mr Sithik Sar (SP5). The manifold duties of SP5 included investigating criminal activities involving drugs, collecting information and effecting arrest and, finally, bringing the arrested persons to court to face charges and be tried.

[8] On 20 May 2003, while SP4 was drinking coffee with a friend of his at the Bukit Bintang area near the BB Plaza, three male Nepalese were seen seated next to SP4. They introduced themselves to SP4 in this order: the appellant

introduced himself as 'Yong' while the second accused introduced himself as 'Bing'. However, the third male Nepalese's name could not be recalled and that was the first and the last time he appeared at the scene. SP4 introduced himself as 'James'.

[9] Soon thereafter, both the appellant and the second accused joined SP4's table and they exchanged greetings with one another. SP4 introduced himself as a businessman. The appellant also introduced himself as a businessman doing the same business as SP4. When SP4 enquired as to how the appellant knew the exact nature of SP4's business, the appellant replied that he could tell by the way SP4 projected himself. SP4 then said that he was a drug trafficker and the appellant likewise responded that he too was a drug trafficker and the appellant stated that he could prove himself as a drug trafficker if SP4 requested him to do so. SP4 then asked whether it was a trap and the appellant denied that it was so and the appellant then handed to SP4 one straw as a sample for SP4 to assess its value. SP4 accepted that sample and told the appellant that SP4 would contact the appellant if the quality was good. They then exchanged their handphone contact numbers and went their separate ways.

[10] SP4 contacted SP5 and narrated to him as to what had transpired. SP5 likewise contacted ACP Kang Chez Chiang (SP6) who was the head of the narcotics division in Kuala Lumpur and SP6 was briefed by SP5 about what had transpired.

[11] On 21 May 2003, a meeting was arranged between SP4, SP5 and SP6 in a restaurant at Hotel JW Marriott. Both SP5 and SP6 recognised SP4 as an agent provocateur using the name of 'James'. The straw that was said to contain drugs that was handed by the appellant to SP4 was handed to SP6 to verify its contents. It was during this meeting that SP4 received a telephone call from the appellant who enquired whether SP4 was satisfied with the sample that was given. SP4 was directed to say that SP4 would contact the appellant a short while later.

[12] As directed, SP4 then contacted the appellant and told the appellant that the sample was good and that SP4 wanted to purchase the heroin from the appellant. The appellant told SP4 that the appellant only possessed 500g of heroin and the price offered was USD25,000 per kg.

[13] A meeting was then agreed between SP4 and the appellant which was scheduled to be held on 22 May 2003 at 2pm at a food stall at Lot 10.

[14] On 22 May 2003 at 2pm at Lot 10, the second accused accompanied by one male African who acted as an interpreter bearing in mind that the second accused was unable to speak in the English language came and met SP4. At this

meeting, the appellant did not turn up. In this meeting, the parties agreed that the price per kg of heroin was USD22,000. And SP4 requested for the supply of at least 3kg of heroin but SP4 was told that, at that point of time, only 550g of heroin were available. SP4 refused to purchase the amount of heroin that was available and SP4 insisted that he wanted to purchase not less than 3kg of heroin. After that meeting, the parties contacted one another by telephone and by way of SMS.

[15] In the evening of 22 May 2003, SP4 met the appellant and the second accused as well as two other Nepalese known as 'Del Bahadur' and 'Suresh Pende' in a restaurant located, according to SP4, in a 'China Town'. But it was not confirmed that these two other Nepalese were in fact Del Bahadur and Suresh Pende. In that meeting, SP4 was informed that they had the supply of 1.2 kg of heroin. That offer was rejected by SP4. SP4 was adamant that he wanted not less than 3kg of heroin. After this meeting, the appellant and the second accused continued to contact SP4.

[16] On 27 May 2003, after discussing with the police, SP4 met the appellant at BB Plaza. In that meeting, SP4 expressed his agreement to purchase 1.2kg of heroin. SP4 suggested that the sale and purchase transaction be carried out on 30 May 2003 at the hotel where SP4 was staying and this suggestion was agreed by the appellant.

[17] On 29 May 2003 at 12.30pm, SP6 booked three rooms at Federal Hotel bearing room Nos 1109, 1110 and 1117 in the names of 'Mohd Salleh Anton', Mr Esa bin Salim (SP8) and SP6. Room 1109 was used as the location where the sale and purchase transaction would take place while the other two rooms were used to supervise the transaction as well as to locate the police personnel before the ambush took place. According to the plan, on 30 May 2003 after the sale and purchase transaction had been effected and after SP4 had confirmed the weight and the authenticity of the heroin, SP4 would make a telephone call to SP6 for SP6 to bring the money in cash. This telephone call would be the signal for the ambush party to swing into action.

[18] On 30 May 2003 at 10.30am, SP6 together with SP5 met SP4 in room 1109 and there SP6 directed SP4 to arrange a meeting between SP4 and the appellant in a KFC restaurant located opposite Federal Hotel at 1pm. Surveillance camera was also installed in room 1109 by SP5 assisted by a staff of the US DEA by the name of 'Arthur Richard'. At 12.30pm, SP6 directed Chief Inspector Mohd Yusmen bin Mohd Yusof (SP2) and Chief Inspector Johari bin Abdullah (SP9) to physically examine SP4 and room 1109 in order to ascertain that no dangerous drugs were hidden in the person of SP4 or in room 1109. Before the examination was conducted, SP6 introduced SP4 as

'James' to SP2 and SP9. And it was for this reason, that both SP2 and SP9 identified SP4 as 'James' before the High Court at Kuala Lumpur. A

[19] SP6 also handed the key to room 1109 to SP4 before the latter went to meet the appellant at the KFC restaurant. When SP4 left room 1109 at 1pm to meet the appellant, SP6 also left room 1109 and proceeded to room 1117. SP5, on the other hand, was in room 1110 watching the video that was taped via the surveillance camera in room 1109. Two ambush parties led by SP2 and SP9 respectively waited in room 1117. B

[20] It must be mentioned that the High Court at Kuala Lumpur disallowed the application to tender the tape recorded video as it contravened the provisions of s 51A of the Criminal Procedure Code (see the ruling at p 51 of the appeal record at *Jilid* 1). C

[21] Be that as it may, as planned SP4 met the appellant who came alone at the KFC restaurant and SP4 then took the appellant to room 1109 of the Federal Hotel. According to SP4, the appellant came without bringing the supply of drugs and SP4 was told by the appellant that the appellant's friend would come bringing the drugs with him. D

[22] In room 1109 of the Federal Hotel, the appellant received a telephone call and the appellant then informed SP4 that the second accused was outside the Federal Hotel. The appellant then went out of room 1109 and a shortwhile later returned with the second accused together with the supply of drugs. According to SP4, the drugs were wrapped in four plastic bags which in turn were wrapped in newspapers and they were then placed on the table. E F

[23] Using a measuring scale that was brought in by the appellant, SP4 weighed the drugs and found them to be 1.1kg and that would be approximately less than 100g from the quantum that was promised. Satisfied as to the authenticity of the drugs and the weight therein, SP4 then telephoned SP6 to bring the money in cash. That telephone call was also the signal for the police party to enter room 1109 and arrest the appellant and the second accused. G H

[24] Even before SP4 telephoned SP6, the latter had directed SP2 and SP9 and the rest of the police party via walkie-talkie to take up positions to the right and to the left of room 1109. I

[25] After receiving the telephone call from SP4, SP6 went out of room 1117 and directed SP9 to press the door bell of room 1109 and be ready to make the ambush. SP9 obeyed and he pressed the door bell of room 1109 and the door was opened by SP4. As planned, SP4 quickly went out of room 1109 and the

raid immediately took place led by SP2 and SP9. According to SP6, the time of the raid was at 1.58pm. Both the appellant and the second accused were caught by surprise and in that predicament they were arrested. On the round table in room 1109, four plastic bags containing white powdery and granular substances, one electronic measuring scale, three pieces of newspapers and one tin of Coca-Cola were found. Both SP2 and SP9 testified that the appellant and the second accused were surprised by the presence of the police party but they did not attempt to run away.

[26] SP9 was directed to handle all the exhibits involved in the raid and he marked all the exhibits meticulously before he handed them to the investigating officer in the person of ASP Yap Huat Tian (SP10) at 7pm on 30 May 2003. The movements of all the exhibits were well accounted for and they were not challenged before us.

[27] In due course, the government chemist in the person of Madam Halimah bt Abdul Halim (SP3) analysed the incriminating exhibits and confirmed that they were heroin weighing 875.2g, a dangerous drug as set out in Part III of the First Schedule to the DDA.

ANALYSIS

[28] At the end of the prosecution's case, the learned judicial commissioner ('JC') of the High Court found that the prosecution had succeeded in establishing a prima facie case after evaluating the evidence of the prosecution on a maximum basis (*Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734 (CA)). The maximum evaluation exercise was done with care and circumspection. We found nothing wrong with the approach of the learned JC.

[29] On possession, this was what the learned JC said in his judgment at p 210 of the appeal record at *Jilid* 2:

> Pendakwaan berjaya mewujudkan kes prima facie membuktikan pemilikan sebenar dan pengedaran dadah dengan membuktikan tiga unsur utama ini:
>
> (a) Kedua-dua tertuduh mempunyai kawalan dan jagaan terhadap dadah tersebut;
>
> (b) Mereka mempunyai pengetahuan mens rea terhadap dadah dalam kawalannya;
>
> (c) Secara terus tanpa bergantung kepada anggapan mereka bertujuan menjual dadah tersebut kepada SP4.
>
> Bagi membuktikan pemilikan sebenar atas dadah yang dipertuduhkan pihak pendakwaan perlu membuktikan kawalan dan jagaan terhadap dadah yang dirampas dan pengetahuan bahawa yang dibawa itu adalah dadah.

[30] Possession is an important ingredient to an offence of trafficking in a dangerous drug. Unless there is direct evidence of trafficking, like the present appeal at hand, the prosecution will have to prove the ingredient of 'possession' and an affirmative finding of 'possession' must be made by the trial court before the presumption of trafficking under s 37(da) of the DDA can be invoked (see the case of *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 (FC)).

[31] On knowledge, this was what the learned JC said at p 210 of the appeal record at *Jilid* 2 at para 4(2):

> Pengetahuan dapat dibuktikan dari keterangan SP4 dari awal pertemuan dengan kedua-dua tertuduh sehingga rampasan dadah di bilik 1109 Hotel Federal. Pengetahuan dibuktikan secara terus oleh SP4 bahawa perbincangan dengan kedua-dua tertuduh adalah berkaitan dengan penjualan dadah bukannya pertukaran wang asing seperti yang ditimbulkan oleh peguambela hanya di akhir kes pendakwaan kepada pegawai penyiasat SP10. Peguambela tidak pun mencadangkan bahawa semasa rampasan duit pada badan tertuduh pertama, duit tersebut adalah untuk tujuan ditukarkan dengan James.

[32] Both knowledge and possession are ingredients that appear, time and again, in drug trafficking cases. In *Toh Ah Loh and Mak Thim v Rex* [1949] MLJ 54, the Court of Criminal Appeal categorically stated that possession, in order to incriminate a person, must have the following characteristics:

(a) the possessor must know the nature of the thing possessed;

(b) the possessor must have the power of disposal over it; and

(c) the possessor must be conscious of his possession of the thing.

[33] Lord Diplock in *Director of Public Prosecutions v Brooks* [1974] 2 All ER 840 (PC), in style, discussed the word 'possession' under s 7(c) of the Dangerous Drugs Law of Jamaica and His Lordship said that in the ordinary sense, one is said to be in possession when one has in one's possession whatever that thing is, to one's own knowledge, physically in one's custody or under one's physical control.

[34] According to Lim Beng Choon J in *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585 that knowledge is an essential element of possession.

[35] In *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717, the Federal Court had occasion to decide on the issue of knowledge. At p 39 (MLJ); p 741 (CLJ), Augustine Paul FCJ writing the main judgment had this to say about knowledge:

The law is clear and well settled. Proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It would be sufficient for the prosecution to prove facts from which it could properly be inferred that the accused had the necessary knowledge. The ratio decidendi of *Toh Su Kuan v Public Prosecutor* [2005] 3 CLJ 740 is thus inconsistent with settled legal principles. In particular it conflicts with the correct statement of the law in the Court of Appeal case of *Wong Nam Loi v Public Prosecutor* [1997] 3 MLJ 95; [1998] 1 CLJ 37 and the application of the principles in the judgment of this court in *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381. The Court of Appeal is therefore justified in this case in disregarding *Toh Su Kuan v Public Prosecutor* [2005] 3 CLJ 740 as the rule of precedent allows it to choose which of its past conflicting decisions it will follow. As a matter of fact the case ought not to be followed as it cannot stand with the judgment of this court in *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381. In any event this court is not concerned with the judgment in *Toh Su Kuan v Public Prosecutor* [2005] 3 CLJ 740 as it is per incuriam. The submission advanced by the appellant is therefore without any merit.

[36] Now, knowledge in the context of the present appeal, can be proved through the evidence of SP4 during the first meeting with the appellant and the second accused right up to the point of time when the drugs were seized from room 1109 of the Federal Hotel. Direct knowledge was proved through SP4 when he discussed with both the appellant and the second accused in regard to the sale of the drugs and not in regard to the exchange of foreign currency that was raised by the defence at the end of the prosecution's case to the investigating officer ASP Yap Huat Tian (SP10). And when some monies were found on the person of the appellant at the time of his arrest, learned defence counsel did not even suggest that those monies were meant to be exchanged with the appellant.

[37] The learned JC correctly made the right inference that both the appellant and the second accused had knowledge of the drugs in question.

[38] It was not a mere coincidence that both the appellant and the second accused were in room 1109 of the Federal Hotel. They were in the said room through the planning of the Malaysian police with the collaboration of the US DEA via an agent provocateur in the person of SP4. Learned defence counsel questioned the identity of SP4 merely on account of the failure of SP4 to produce his passport. But, it must be borne in mind that SP4 was identified as an agent provocateur through the prosecution's witnesses, namely, SP2, SP5 and SP9.

[39] Section 40A of the DDA is a life saver for the prosecution. It is a special provision to make admissible the evidence of an agent provocateur notwithstanding that the agent provocateur 'attempted to abet or abetted the

commission of an offence by any person under this Act if the attempt to abet or abetment was for the sole purpose of securing evidence against such person' (see s 40A(1) of the DDA).

[40] It is now ideal to refer to the House of Lords case of *R v Sang* [1980] AC 402. In that case, the point of law on which the appeal actually turned was on the question of whether a judge has a discretion to exclude the prosecution evidence if satisfied that the offence charged was instigated by an agent provocateur and, but for this, would not have been committed by the accused. The House of Lords held that, whatever the ambit of the judicial discretion to exclude admissible evidence, it does not extend to excluding evidence of a crime on the grounds that it was instigated by an agent provocateur, because if it did so extend it would amount to a procedural device whereby the trial judge could avoid the substantive law, under which it is clearly established that there is no defence of entrapment (see *Michael James McEvilly, Peter John Lee* (1973) 60 Cr App R 150; and *Jeremiah Mealey, Philip Michael Sheridan* (1974) 60 Cr App R 59). But, the point of law of general importance certified by the Court of Appeal went beyond the issue of agents provocateurs and raised a much wider question of: 'Does a trial judge have a discretion to refuse to allow evidence, being evidence other than evidence of an admission, to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?' Even though it was not necessary for Their Lordships to answer the certified question in its full breadth, they proceeded to do so, and the primary importance of the case of *Sang* is the answer given on an obiter basis. Treating the certified question as if it were not confined to trial by jury but concerned the existence of the discretion in any criminal trial, be it in the Crown Court or in a magistrate's court, Their Lordships, by way of an answer, agreed with the speech of Viscount Dilhorne at p 437 which was worded in this way:

> (1) A trial judge in a criminal trial has always a discretion to refuse to admit evidence if in his opinion its prejudicial effect outweighs its probative value. (2) Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after commission of the offence, he has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an agent provocateur.

[41] Most of the cases post *Sang* has neither clarified nor refined the principles laid down in *Sang*. Three examples need only be mentioned. The first is the case of *Winter v Barlow* [1980] RTR 209. The second is *Doyle v Leroux* [1981] RTR 438. The third would be the case of *Dennis Geoffrey Clarke* (1985) 80 Cr App R 344.

[42] Lord Roskill in *Morris v Beardmore* [1981] AC 446, said at p 469 that in *Sang* the House of Lords had carefully defined the limits of judicial discretion to exclude evidence otherwise clearly admissible, setting at rest many doubts which had previously existed as to its existence and scope, and that it would be a retrograde step to enlarge upon its now narrow limits or to engraft an exception, merely in order to meet the situation under discussion in that case.

[43] Back home in Malaysia, Yusof Abdul Rashid J in *Public Prosecutor v Mohamed Halipah* [1982] 1 MLJ 155, at pp 156–157, after alluding to s 40A of the DDA aptly stated that 'the evidence of an agent provocateur need no corroboration to found a finding by a court'.

[44] In *Public Prosecutor v Neoh Wan Kee* [1985] 1 MLJ 368, at p 372, Edgar Joseph Jr J succinctly said:

> PW2 was undoubtedly an agent provocateur but the testimony of such a witness is not to be presumed unworthy of credit by reason only of his having attempted to abet or abetted the commission of an offence by any person under s 39B if the attempt to abet or the abetment was for the sole purpose of securing evidence against such person, as was the case here: s 40A of the Act.

[45] It is our judgment that any statement made by the appellant to SP4 shall be admissible at the trial and there is no requirement for the evidence of SP4 — an agent provocateur, to be corroborated. This legal position is supported by the decision of the Supreme Court in the case of *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 (SC). At p 343, Syed Agil Barakbah SCJ delivering the judgment of the Supreme Court had this to say:

> In the case of PW1 it was clear from the facts and surrounding circumstances that he was an agent provocateur. As such, he is protected by the provision of ss 40A(1) and (2) of the Act in that he is not presumed to be unworthy of credit and his evidence relating to any attempt to abet or abetment of the offence if done for the purpose of securing evidence against an accused person, is admissible. Similarly, any statement made to him by an accused person shall be admissible at the trial. There is therefore no requirement for the evidence of an agent provocateur to be corroborated.

[46] As an agent provocateur, the evidence of SP4 stood solid as the rock of Gibraltar. Learned defence counsel failed to weaken the evidence of SP4 in regard to the discussions which SP4 had with the appellant and the second accused at the three named places which culminated in room 1109 of the Federal Hotel where they were arrested. The learned JC in his judgment made the following germane observations at p 211 of the appeal record at *Jilid* 2:

Mahkamah ini juga memerhatikan demeanour SP4 ini dan berpuashati beliau memberi keterangan dengan tenang dan keterangannya tidak bercanggah dengan keterangan saksi pendakwaan yang lain. Mahkamah juga mendapati bahawa keterangan saksi SP4 ini disokong oleh keterangan saksi-saksi pendakwaan yang lain dan barang-barang kes lain yang dikemukakan telah memperkukuhkan kes pendakwaan (*Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110 dan *Tara Singh v Public Prosecutor* [1949] MLJ 88).

[47] Two principles of law must be put to the forefront:

(a) Firstly, the agent provocateur's evidence requires no corroboration and an accused person can be convicted on the uncorroborated evidence of the agent provocateur (*Public Prosecutor v Neoh Wan Kee*; and *Namasiyiam & Ors v Public Prosecutor*).

(b) Secondly, the evidence of an agent provocateur is not that of an accomplice and it does not require corroboration (*Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] MLJ 71).

[48] Section 134 of the Evidence Act 1950 stipulates that no particular number of witnesses shall be required for the proof of any fact. What this amounts to is this. That the testimony of a single witness, if believed, is sufficient to establish any fact (*Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457, 580). Sinha J in *Vadivelu Thevar v The State of Madras* AIR 1957 614 (SC) when delivering the unanimous decision of the Indian Supreme Court applied the maxim that 'evidence has to be weighed and not counted' in the context of s 134 of the Indian Evidence Act 1872 (which is identical to our s 134 of the Evidence Act 1950).

[49] Here, as an agent provocateur SP4's evidence was sufficient to establish the fact that the appellant and the second accused trafficked in the dangerous drugs.

[50] The learned JC rightly held that the dangerous drugs were brought to room 1109 of the Federal Hotel by both the appellant and the second accused. It must be recalled that the prosecution witnesses had testified that they examined room 1109 of the Federal Hotel as well as the body of SP4 to make sure that no drugs were planted in the said room nor carried by SP4 before the operation to arrest both the appellant and the second accused took place in the said room. Thus, once both the appellant and the second accused entered room 1109 with the dangerous drugs and SP4 had confirmed that it was so, SP4 gave the signal for the police party to enter the said room and effect the necessary arrest. At this juncture, the evidence of SP4 pertaining to what had transpired before, during and after the arrest of both the appellant and the second accused

must be taken to be credible pursuant to s 40A of the DDA. It must be emphasised that the evidence of SP4 as an agent provocateur requires no corroboration at all.

[51] The learned JC was right when he held that the drugs were not brought by Del Bahadur and Suresh Pende to room 1109 of the Federal Hotel as alleged by the appellant. The allegations by the appellant that while SP4 was alone in the said room, Del Bahadur came and brought a bag containing the drugs and gave it to SP4 and when both the appellant and the second accused entered the said room, the drugs were already in the said room were rejected by the learned JC. According to the learned JC that if he were to accept the allegations by the appellant as true, this meant that both the appellant and the second accused were victims of a scheme perpetrated by senior police officers from Malaysia as well as the drug enforcement agency of the United States of America.

[52] It must be recalled that at the meeting held at BB Plaza Bukit Bintang, SP4 confirmed that Del Bahadur and Suresh Pende were not there at all. And the meeting at Lot 10 Bukit Bintang was witnessed by SP5 and SP6 and during this meeting Del Bahadur and Suresh Pende were also not there. Only at the meeting in 'China Town', two of the appellant's friends were present but they were not confirmed to be Del Bahadur and Suresh Pende. And at the time of the arrest at room 1109 of the Federal Hotel, not a single prosecution witness testified that Del Bahadur and Suresh Pende were present. In fact, the prosecution witnesses did not even know who were Del Bahadur and Suresh Pende. If Del Bahadur and Suresh Pende were the owners and sellers of the drugs as alleged and both the appellant and the second accused were victims of circumstances and were only interested in exchanging foreign currencies, why didn't Del Bahadur and Suresh Pende turn up at the meetings at BB Plaza and Lot 10? This showed that both the appellant and the second accused took the opportunity of putting the entire blame to the two Nepalese men as the owners and sellers of the drugs. It must be emphasised that there was no cross-examination of SP4 that it was Del Bahadur who came and brought a bag containing the drugs and gave it to SP4 in room 1109 of the federal hotel. There was also no cross-examination of SP4 that Del Bahadur and Suresh Pende were present at the 'China Town' meeting.

[53] The learned JC rightly rejected the contentions that both the appellant and the second accused went to room 1109 of the Federal Hotel to meet SP4 for the sole purpose of exchanging foreign currencies bearing in mind that this was only raised when the defence cross-examined SP10—the investigating officer. But it was not put to SP4 when SP4 was giving evidence and this prompted the learned JC to comment that it was an after thought on the part of the defence.

[54] Even though this issue was raised for the first time during the cross-examination of SP10, yet the learned JC considered this issue in his judgment (*Public Prosecutor v Kenneth Fook Mun Lee & Another Appeal* [2007] 1 MLJ 34; [2006] 1 CLJ 499, (CA)) and he rightly said that this defence was detrimental to both the appellant and the second accused. We agree and we venture to say that the monies found on the persons of the appellant and the second accused were too little to warrant the suggestion that both of them met SP4 in room 1109 of the Federal Hotel in order to exchange foreign currencies.

[55] On the person of the appellant, the police recovered at the time of his arrest cash in Singapore currency amounting to S$20 dollars (exh P22B), cash in American currency USD100 dollars (exh P22C), cash in Australian currency $50 dollars (exh P22D), and cash in Thai currency amounting to 700 Baht (exh P22E).

[56] While the second accused only had on his person, at the time of his arrest, cash in Singapore currency amounting to S$5 dollars (exh P24B) and cash in Nepalese currency amounting to 600 Rupees (exh P24C).

[57] These sums recovered were too negligible. It was illogical for them to exchange these currencies and met SP4 at BB Plaza, Lot 10 and at 'China Town' before finally meeting SP4 at room 1109 of the Federal Hotel. It was an elaborate process that started from 20 May 2003 right up to 30 May 2003. It was not a case where both the appellant and the second accused were planning to exchange million dollars worth of foreign currencies to Malaysian Ringgit that entailed an elaborate process which culminated in the police having to book three rooms at the Federal Hotel.

[58] With such negligible sums, both the appellant and the second accused would benefit financially if they were to exchange with the money changers which can be found in and around the Bukit Bintang areas. The three meetings at the designated places as alluded to in this judgment would be costly for both the appellant and the second accused to incur. Bus or taxi fares from their homes in Puchong to Kuala Lumpur would cost at least RM50. Moreover no money changer in Malaysia in his right mind would be bothered to go to the extreme of meeting both the appellant and the second accused at the three designated places and, finally, to meet at room 1109 of the Federal Hotel to exchange paltry foreign currencies.

[59] In our judgment, the elaborate meetings at the three designated places which culminated in meeting SP4 in room 1109 of the Federal Hotel were meant to transact the heroin, the subject matter of the charge and nothing else. It was a straight forward case of trafficking in heroin and nothing else.

[60] The value of the heroin at 1kg was listed at more than USD22,000. It was thus unreasonable to expect Del Bahadur and Suresh Pende to bring the heroin to room 1109 of the Federal Hotel in order to trap both the appellant and the second accused without any reason nor motive. Both the appellant and the second accused did not suggest to the prosecution witnesses that Del Bahadur and Suresh Pende were their arch enemies and were bent to put them in trouble with the law. Both the appellant and the second accused merely stated that they went to room 1109 of the Federal Hotel to exchange foreign currencies with that of Malaysian currencies.

[61] It is our judgment that it is pertinent to put across the defence of wanting to exchange foreign currency with Malaysian Ringgit directly to SP4 and not to SP10 bearing in mind that the principal actor of the day was SP4 — the agent provocateur (*Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 and *Megat Halim Megat Omar v Public Prosecutor* [2009] 1 CLJ 154 (CA)). Be that as it may, just like the learned JC we have also considered the defence of exchanging foreign currency at some length and we found it to be devoid of merit. We shall allude to the defence of the appellant in extenso at a later stage of this judgment.

[62] On maximum evaluation at the stage of the prosecution's case, the learned JC found that both the appellant and the second accused were arrested in room 1109 of the federal hotel with the drugs as a result of the meetings and discussions which they had with SP4 earlier on. Actual possession of the drugs and trafficking of the drugs were proved without the need to invoke the presumptions in the DDA.

[63] Proof of direct trafficking without the aid of the presumption are reflected via the discussions which both the appellant and the second accused had with SP4 at the three designated places coupled with the knowledge that they were selling the drugs which ended with their arrest at room 1109 of the Federal Hotel. Their arrest with the drugs showed that they brought the drugs to the said room to sell to SP4 at an agreed price of USD22,000 per kg. And the drugs that were seized by the police in the said room was less than what they promised to SP4 (*Mohamad Yazri bin Minhat v Pendakwa Raya* [2003] 2 MLJ 241; [2003] 2 AMR 404 (CA); *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401; [2002] 3 AMR 3457; and *Namasiyiam & Ors v Public Prosecutor*).

[64] From the factual matrix, the irresistible inference that can be drawn from the totality of evidence at the prosecution's stage was that both the appellant and the second accused were selling the drugs for the purpose of trafficking in it. Selling the drugs to SP4 is only one of the acts that constitute trafficking in s 2 of the DDA. A prima facie case had been made out for

trafficking in 875.2g of heroin and both the appellant and the second accused were called for their defence by the learned JC.

[65] The appellant elected to give his evidence under oath. According to the appellant he came to Malaysia on 14 May 2003 using a tourist visa and he stayed in Puchong together with the second accused whom he knew since young. On 29 May 2003, the appellant together with the second accused and two others by the name of Del Bahadur and Suresh Pende met at a coffee shop at Bukit Bintang Plaza. While they were there, they met two other male Africans named 'James' and 'Amir' who were friends of Del Bahadur and Suresh Pende. According to the appellant, Del Bahadur was known as 'Yong' while Suresh Pende was known as 'Bing'. In that meeting, the appellant expressed his desire to exchange with 'James' and 'Amir' US and Singapore currencies which the appellant had with Malaysian Ringgit and for this purpose the appellant made an appointment to meet both 'James' and 'Amir' on 30 May 2003 at the Federal Hotel at 1pm.

[66] The appellant continued with his testimony. He testified that on 30 May 2003, he telephoned Del Bahadur and he was told to proceed straight to the Federal Hotel. And when he and the second accused arrived at the said hotel, they met 'Amir' at the hotel lobby and they were told that Del Bahadur and 'James' were in room 1109. 'Amir' then told both of them to proceed first to the said room and that 'Amir' would come later. While they were waiting for the lift, they met Del Bahadur who just got out of the lift and Del Bahadur told them to proceed to room 1109 where 'James' was already there. Del Bahadur told them that he wanted to meet 'Amir' and that he together with 'Amir' would join them later.

[67] When both the appellant and the second accused arrived at room 1109, they knocked at the door. The door to room 1109 was opened by 'James' who invited them in and they entered the said room and sat on the bed. Soon thereafter the appellant heard knocking at the door and the appellant thought that it was Del Bahadur and 'Amir'. When the door to room 1109 was opened by 'James', the appellant saw a group of eight to twelve individuals (later identified as police officers) rushed in and arrested both the appellant and the second accused. The police handcuffed the hands of both the appellant and the second accused and they were directed to kneel on the floor with their faces facing downwards while the police physically examined them.

[68] The police then examined room 1109 and both the appellant and the second accused were shown an auburn coloured ('berwarna perang') bag and they were asked as to who owned that bag. The appellant denied that he carried the bag and he said that he only saw the exhibits that were seized, namely, exhs

P11A–D, P12, P13 and P14F for the first time in court. The appellant also said that he did not see 'James' nor Del Bahadur nor 'Amir' anymore once the door to room 1109 was opened.

[69] When the appellant was asked by his counsel whether SP4, the prosecution's witness by the name of 'Mensah' is also known as 'James', the appellant denied that SP4 and 'James' are one and the same person. According to the appellant, 'James' did not come to court to testify. The appellant said that he did not see 'James' giving evidence in court. Even though the appellant remembered that SP4 by the name of 'Mensah' gave evidence but the appellant was adamant that SP4 was not 'James'. According to the appellant, he met 'James' before and the person by the name of 'James' whom he met was stout, taller and with long hair wearing spectacles. The appellant reiterated that his purpose of seeing 'James' on that day was to change the foreign currency which he had with him.

[70] Under cross-examination, the appellant testified that he came to Malaysia to meet the second accused. The appellant admitted that he knew the second accused since young and that the second accused came to Malaysia before the date of the offence and that the second accused worked in Malaysia. According to the appellant, the second accused worked in a National Panasonic factory. The appellant said that he met Del Bahadur and Suresh Pende and that he knew them when he was in Nepal and the second accused brought the appellant to meet them.

[71] The appellant said that Del Bahadur and Suresh Pende were already in Malaysia for the last three to four years. According to the appellant, 'James' and 'Amir' brought him to see Del Bahadur and Suresh Pende. The appellant said that he came to Malaysia as a tourist for a month and after that he proposed to return to Nepal. When asked as to why the appellant wanted to see 'James' and 'Amir' when the appellant merely wanted to exchange currency, the appellant answered in this way. That 'James' and 'Amir' were good friends of Del Bahadur and Suresh Pende. And Suresh Pende told him that the rates offered by 'James' and 'Amir' were evidently higher than the market rate. When asked how much money he proposed to change, the appellant replied S$500 Singapore dollars and USD300 US Dollars.

[72] According to the appellant, he brought S$300 Singapore Dollars, USD300 US Dollars, 4,000 Thai Bhat and a bit of Australian currency to the Federal Hotel on that day. The appellant said that he came to Malaysia direct from Nepal to visit the second accused and it was the second accused who fetched him when he arrived at the airport. On the advice of his friends in Nepal, the appellant brought those currencies to Malaysia so that he could spend it in Malaysia. The appellant said that he owned a mini market in Nepal.

[73] The learned deputy public prosecutor continued to cross-examine the appellant along the following lines:

(a) that SP4 was in fact James;

(b) that James used to transact the sale and purchase of the drugs with the appellant and the second accused;

(c) that the purpose of the appellant in going to the Federal Hotel was to hand over the drugs;

(d) that before 29 May 2003, the appellant met James several times;

(e) that Del Bahadur and Suresh Pende were not involved in this case;

(f) that Del Bahadur and Suresh Pende did not exist; and

(g) that Amir did not exist.

[74] The learned deputy public prosecutor then put across the following points:

(a) that there were negotiations about the sale and purchase of the drugs between the appellant and James a few days prior to 30 May 2003;

(b) that the drugs belonged to the appellant and the second accused; and

(c) that the appellant's evidence were mere concoctions.

[75] In re-examination, the appellant stated that he stood to gain if he were to change his foreign currency with James as opposed to the money changer. According to the appellant the market price at that time for RM3.70 sen would be USD1. Whereas James offered RM3.90 sen for each USD1. And according to the appellant for every dollar he would get 20 or 30 cents. And it is the same for the Singapore currency. All in, the appellant said that if he were to change US dollar and Singapore dollar, he would gain about RM160 from the transaction.

[76] It is pointless to re-gurgitate the defence of the second accused as his appeal, due to his death, has been dismissed by this court. Suffice for us to say that the defence of both the appellant and the second accused synchronised with one another but run counter to the prosecution's case. In the words of the learned JC at p 230 of the appeal record at *Jilid* 2:

> Pembelaan yang diutarakan oleh kedua-dua tertuduh adalah selari tetapi menyimpang dengan fakta kes pendakwaan.

[77] It is our judgment that the defence of the appellant was an afterthought. Since the appellant and the second accused were arrested in room 1109 of the

Federal Hotel, they raised the defence that they went into that room for the purpose of exchanging foreign currency with Malaysian Ringgit. And flowing from this, they raised the defence that they were framed up by James and two of their friends named Del Bahadur and Suresh Pende.

[78] The appellant denied that SP4 was the 'James' whom he met prior to his arrest in room 1109 of the federal hotel. The identity of SP4 was challenged when SP4 failed to bring his personal document in the course of giving evidence. And this was only raised at the defence stage. This issue, in our judgment, cannot raise a doubt in the prosecution's case for the following reasons:

(a) that SP5, SP6 and SP9 had identified SP4 as the same person who had discussed with them prior to the arrest of the appellant in room 1109; and

(b) that the same SP4 was found in room 1109 when the appellant and the second accused were arrested with the drugs.

[79] We are constrained to say that when the defence realised that the attack on the identity of SP4 was not successful, the defence raised through cross-examination of SP10 the issue of exchanging foreign currency with Malaysian Ringgit. However, the monies that were found on the person of the appellant did not tally with the evidence of the appellant that the appellant intended to exchange foreign currencies in the denominations of S$300 Singapore Dollars, USD300 US Dollars, 4,000 Thai Bhat and a bit of Australian currency. Furthermore SP9 testified that the monies that were found on the persons of both the appellant and the second accused at the time of the arrest were minimal. Despite these discrepancies, the defence saw it fit not to challenge SP9 and put to SP9 that more monies were indeed carried by both the appellant and the second accused. The defence too did not cross-examine SP10 — the investigating officer, in regard to the amount of monies carried by both the appellant and the second accused.

[80] The law journals are replete with authorities in regard to the failure to cross-examine a witness. Cross-examination is usually done with a view to adducing further evidence in respect of an issue or with a view to contradicting the evidence-in-chief of the witness concerned. The cross-examiner will launch an attack in order to impugn the general credibility of the witness. Cross-examination of an issue may take the form of retracing the evidence which a witness has given with a view to placing a different complexion or emphasis or interpretation on it; or the cross-examiner may be bold and may take the witness into new unchartered areas on which the witness has not previously testified but on which the witness's evidence may be favourable to the cross-examining party.

[81] While cross-examination as to credit is purely based on the skill and experience of the cross-examiner. The cross-examiner may trace the evidence in such a way that the witness's observation, recollection, perception and judgment may be challenged. In addition to this, the cross-examiner may even seek to show that the witness is not someone who can safely be believed on oath.

[82] Unlike examination-in-chief, in cross-examination the cross-examiner may asked leading questions (*Parkin v Moon and Another* (1836) 7 CAR & P 408). It is the duty of the trial judge to control vexatious, unfair, misleading or irrelevant cross-examination (*Bernard Harry Simmonds, William Holford Barrington-Coupe, Terence William Orwell, Henry Cohen, Hampden Co (Sales) Ltd, Hampden Co (Electronics) Ltd* (1967) 51 Cr App R 316; *R v Kalia and Others* [1975] Crim LR 181; *Robert John Maynard, Reginald John Dudley, Charles Edwin Clarke, Kathleen Dudley* (1979) 69 Cr App R 309; *William Baldwin* (1925) 18 Cr App R 175; and *R v Sweet-Escott* (1971) 55 Cr App R 316).

[83] And where a party fails to cross-examine a witness on his evidence or any particular part of it, like the present appeal, such failure amounts to implied acceptance of the evidence and that party is not allowed to challenge it later (*Walter Berkley Hart* (1932) 23 Cr App R 202; *R v Bircham* [1972] Crim LR 430; *Kevin Fenlon, Raymond Frank Neal, Gary Steven Neal* (1980) 71 Cr App R 307; and *R v Wood Green Crown Court, ex P Taylor* [1995] Crim LR 879). The reason for this simple rule is this. That the rule exists to ensure fairness to the witness and to the court in that it gives an opportunity to the witness to put his case in the face of any contradiction which he plans to make to his testimony (per Lord Halsbury in *Browne v Dunn* (1893) 6 R 67, at p 76).

[84] Witnesses should be challenged when they are in the witness box and the failure to do so should be held against the accused (*Re Pichi Muthu* [1970] 2 MLJ 143; *Public Prosecutor v Abang Abdul Rahman* [1982] 1 MLJ 346; *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29; *AEG Carapiet v AY Derderian* AIR 1961 Cal 359; *Browne v Dunn*; *Rosita bte Baharom & Anor v Sabedin bin Salleh* [1992] 1 MLJ 379; *Rex v Velayuthan* [1935] 4 MLJ 277; *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 (CA); *Public Prosecutor v Mohd Fahmi bin Hamzah* [2002] 6 MLJ 340; *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699 (CA); and *Public Prosecutor v Ee Boon Keat* [2006] 2 MLJ 633).

[85] Now, SP4's role as an agent provocateur under s 40A of the DDA was not challenged by the defence. According to learned counsel in his written submission, 'The issue here is not SP4's role as an agent provocateur under section 40A that has been challenged but SP4's identity itself cast a doubt'. So

it can be surmised that the main complaint of learned counsel for the appellant was in regard to the failure of the prosecution to prove the identity of SP4 beyond reasonable doubt. This was, according to learned counsel in his written submission, the real issue to be determined.

[86] But the petition of appeal do not support the contention of learned counsel. There is no mention about challenging the identity of SP4 in the petition of appeal. Nevertheless, we have been magnanimous. We have considered the identity of SP4 in the early part of this judgment.

[87] We shall now deal with the grounds set out in the petition of appeal.

THE FIRST GROUND

[88] Whether the learned JC erred and wrongly directed himself when he did not hold that the evidence of SP4 was weak and, consequently, he failed to hold that the prosecution had failed to prove a prima facie case under s 180(1) of the Criminal Procedure Code ('CPC')? We have scrutinised the evidence of SP4 and found that his evidence inspires confidence. There is no legal impediment in convicting the appellant on the sole testimony of a single witness — more so when that witness was an agent provocateur like SP4. The evidence showed that SP4 was discussing with the appellant and the second accused in regard to the sale and purchase transaction of heroin. On the date as per the charge, the appellant and the second accused brought the heroin to room 1109 of the Federal Hotel. There was overwhelming evidence to establish a prima facie case against the appellant (s 180(1) of the CPC; *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85(FC); *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 AMR 2017; *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678; [1998] 4 CLJ 209; *Public Prosecutor v Saare Hama & Anor* [2001] 4 MLJ 480; and *Looi Kow Chai & Anor v Public Prosecutor*). The first ground must fail.

THE SECOND GROUND

[89] Whether the learned JC erred in holding that there was corroborative evidence to the evidence of SP4 as an agent provocateur whereas in reality there was no such corroborative evidence in material particulars in support of the evidence of SP4? We have said earlier that there is no requirement for the evidence of SP4 as an agent provocateur to be corroborated. The learned JC was correct when he held that the evidence of SP4 could stand alone without any corroboration at all. The credibility of SP4 was not questioned by the learned JC and he was satisfied with the evidence of SP4. Additionally the learned JC also found that the evidence of SP4 was corroborated by other prosecution witnesses as well as by the exhibits. This ground must, likewise,

fail.

THE THIRD AND THE FOURTH GROUNDS

[90] Whether the learned JC had erred and misdirected himself when he did not hold that the prosecution failed to establish its case beyond reasonable doubt bearing in mind that the case for the prosecution hinged on the evidence of SP4 which was questioned and the evidence of SP6 contradicted the evidence that was presented before the court? In our judgment, the learned JC did not err nor misdirected himself when he held that the prosecution had proved its case beyond reasonable doubt. From the grounds of judgment of the learned JC, it is apparent that his decision did not hinge solely on the evidence of SP4. Apart from the firm evidence of SP4 which showed that the appellant trafficked in heroin, there was also supportive evidence emanating from witnesses like SP5 and SP6. It was submitted that the evidence of SP4 standing alone was overwhelming to prove the prosecution's case beyond reasonable doubt. The learned JC evaluated the evidence of SP4 on a maximum basis. At p 215 of the appeal record at *Jilid* 2, this was what the learned JC said:

> Di peringkat pendakwaan bukti adalah melimpah ruah keterangan di pihak menunjukkan bahawa kedua-dua tertuduh ditangkap dengan dadah di dalam bilik hotel bersama-sama dengan SP4 yang mereka pernah bertemu dan berbincang pembelian dadah tersebut sebelum ini. Pembuktian miiikan sebenar dan pengedaran dibuktikan tanpa perlu menggunakan anggapan.

[91] The learned JC had assessed and considered *the defence of the appellant* and concluded that the *defence* was an afterthought and the allegations that the appellant was framed up by SP4 and two others were raised for the first time at the defence stage.

[92] In regard to the contradictions in the evidence of SP6, they were not material. They were minor contradictions which did not affect the prosecution's case. SP6 testified in his capacity as a responsible police officer who planned the operation and to uncover evidence through SP4 in order to establish that the appellant was a drug trafficker. These two grounds must fail.

THE FIFTH GROUND

[93] Whether the failure of the prosecution to tender evidence in regard to the SMS between SP4 and the appellant had resulted in the prosecution's failure to prove its case beyond reasonable doubt? It is our judgment that there is no necessity for the prosecution to tender the evidence about the SMS between SP4 and the appellant. On the available evidence, we have the direct evidence of the conversation between SP4 and the appellant in regard to the

sale and purchase transaction of the heroin. That was sufficient to prove the prosecution's case beyond reasonable doubt. In our judgment, the sterling quality of SP4's evidence pointed to the guilt of the appellant. This ground has no merit and it must fail.

THE SIXTH GROUND

[94] Whether the evidence of ASP Rohayu bt Abd Gani, the DNA analyst (SP7) contradicted exhs P16 and P17 and, consequently, the learned JC should hold that the prosecution failed to prove its case beyond reasonable doubt? It is our judgment that the evidence of SP7 did not contradict exh *P16* — the 'Perakuan Serah Menyerah Exhibit', nor exh P17 — the 'Serah Menyerah Barang Kes'. SP7 received those exhibits listed in exh *P16* from ASP Izanizam bin Salleh (SP11) on 17 June 2003 as reflected in the notes of evidence at p 69 of the appeal record at *Jilid* 1. And the receipt of the four plastic packets containing heroin was confirmed by SP11 as reflected in the notes of evidence at pp 120–121 of the appeal record at *Jilid* 1. Exhibit P16 was prepared by SP11. In his evidence SP11 admitted that he inadvertently omitted writing the symbols 'A1' to 'A4' in exh P16 but he had identified the exhibits as reflected in photographs P7A and P7B which included the four plastic packets containing the heroin. No contradictions can be found between exhs P16 and P17. It must be stated that exh P17 was prepared by SP7. In her evidence, SP7 explained as to why the words 'Keratan akhbar' were not recorded in exh P16 but in exh P17 the words '(3) Keratan akhbar' were recorded therein (see the notes of evidence at pp 70–71 of the appeal record at *Jilid* 1). For these reasons, this ground must also fail.

THE SEVENTH GROUND

[95] Whether the learned JC erred and misdirected himself when he failed to hold that the prosecution had failed to prove its case beyond reasonable doubt that room 1109 of the federal hotel could be accessed by others and that s 34 of the Penal Code had not been proved by the prosecution? Learned defence counsel submitted that after room 1109 had been searched, SP6 surrendered the room key to the said room to SP4 and the latter then left the said room and proceeded to the KFC restaurant across the street to meet the appellant. Learned defence counsel further submitted that there was a gap of about an hour between the time SP4 left the said room and later returned before the raid to the said room was conducted. There was, according to learned defence counsel, no evidence that the said room was fully secured and no other person had access to the said room.

[96] The learned deputy public prosecutor, by way of a rebuttal, submitted that whether the said room was accessible to others was a non-issue. He drew

our attention to some passages in the judgment of the learned JC at p 204 of the appeal record at *Jilid* 2 to drive home the point that the said room was under surveillance by the police personnel. Those passages read as follows:

> Kamera pengawasan turut dipasang di bilik 1109 oleh SP5 bersama seorang lagi anggota daripada U.S. DEA bernama 'Arthur Richard'. Pada jam 12.30 tengahari, SP6 mengarahkan SP2 dan SP9 untuk membuat pemeriksaan ke atas SP4 dan bilik 1109 untuk memastikan bahawa tiada dadah yang disembunyikan. Sebelum pemeriksaan tersebut, SP4 telah dikenalkan oleh SP6 kepada SP2 dan SP9 dengan nama 'James'. SP2 dan SP9 telah mengecam SP4 sebagai James di mahkamah. Seterusnya, kunci bilik 1109 diserahkan oleh SP6 kepada SP4 sebelum SP4 pergi berjumpa dengan Yong di tempat yang dijanjikan. Apabila SP4 beredar dari bilik 1109 pada jam 1.00 petang untuk bertemu Yong, SP6 turut beredar dan menunggu di bilik 1117 manakala SP5 berada di bilik 1110 sambil memerhatikan rakaman video dari kamera pengawasan yang telah dipasang di bilik 1109.

[97] Evidence wise, this was what SP5 testified in examination-in-chief in regard to the setting up of the recording equipment at p 49 of the appeal record at *Jilid* 1:

> During this (time), myself and Arthur Richard who is also employed by the United State(s) (DEA) set up the recording equipment and camera to video tape the pending meeting in room 1109.

[98] Further down at the same page, SP5 continued to testify as follows:

> I set up (the) video in that room. The video will start to record once they come in (sic) (enter) the room (and) the recording (will then start).

[99] Continuing at p 50 of the appeal record at *Jilid* 1, this was what SP5 testified:

> I set up surveillance to room 1109. We see and we could hear from this recording but I can still hear from the next room without (the aid of) this video. The camera video is (so) small, we could place (it) in the lamp or (on) the (fan) — device used by DEA.

[100] Section 34 of the Penal Code provides that criminal liability will be imputed equally to all participants where it can be proved that the parties acted with a common intention. To attract s 34 of the Penal Code, it has to be established that there was a plan or a meeting of mind of all the accused persons to commit the offence. The plan may be pre-arranged or it may develop on the spur of the moment but before the commission of the crime (*Kilari Malakondiaah @ Malayadri & Ors v State of Andhra Pradesh* [2009] 1 SC 487). Essentially, it is a question of fact and it is rather subjective. Common intention can also be inferred from the facts and circumstances of the case which includes

the conduct of the accused persons acting in concert to commit the offence (*Maqsoodan & Ors v State of UP, State of UP v Maqsoodan etc* AIR 1983 SC 126).

[101] Now, from the factual matrix there was a bond of common intention between the appellant and the second accused. It was a bond that was pre-arranged and not developed on the spot or on the spur of the moment (*Kirpal and others v State of Uttar Pradesh* AIR 1954 SC 706). That bond of common intention culminated when the appellant and the second accused brought the heroin to room 1109 of the Federal Hotel. This is our judgment and accordingly the seventh ground must also fail.

[102] We have considered anxiously the additional grounds to the petition of appeal that came in by way of a notice of motion in encl 23a supported by an affidavit in encl 23b. These additional grounds have also been considered in this judgment and they are of no assistance to the appellant.

[103] Learned counsel in his oral submission questioned the failure of the prosecution in not calling nor offering Mohd Salleh Anton who booked one of the rooms in the Federal Hotel. Learned counsel in his oral submission also questioned the non-calling of Del Bahadur and Suresh Pende by the prosecution and the failure to offer them to the defence. And flowing from that we were invited, even though it was not itemised in the petition of appeal, to invoke s 114(g) of the Evidence Act 1950 against the prosecution in that the court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.

[104] At the outset we must categorically say that the power of the court to draw such an adverse inference is entirely discretionary (*Chua Keem Long v Public Prosecutor* [1996] 1 SLR 510; *Chia Sze Chang v Public Prosecutor* [2002] 4 SLR 523; *Khua Kian Keong and another v Public Prosecutor* [2003] 4 SLR(R) 526; and *Chew Gim Ser v Public Prosecutor* [2005] 1 SLR (R) 201).

[105] And according to Mohamed Azmi SCJ in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, at p 494 (FC):

> It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[106] It is trite law that the prosecution has a discretion as to whether or not to call any particular witness especially when the prosecution does not believe that that particular witness to be a witness of truth (*Khoon Chye Hin v Public Prosecutor* [1961] MLJ 105; and *Adel Muhammed El Dabbah v Attorney-General for Palestine* [1944] AC 156). It must be borne in mind that the prosecution is not duty bound to call all the witnesses from whom statements may have been taken (*Public Prosecutor v Teh Cheng Poh* [1980] 1 MLJ 251). This is in line with s 134 of the Evidence Act 1950 as alluded to earlier that no particular number of witnesses shall in any case be required for proof of any fact. Of significance is this. The prosecution must call all the necessary witnesses in order to unfold the story upon which its case is based. In our judgment, this was done by the prosecution.

[107] SP6 testified that the police used the name of Mohd Salleh Anton as a nickname to book one of the rooms in the Federal Hotel in order to carry out the operation of arresting the appellant and the second accused. Thus, there was no basis to invoke s 114(g) of the Evidence Act 1950 in regard to the non-calling of Mohd Salleh Anton by the prosecution.

[108] In regard to Del Bahadur and Suresh Pende, there was evidence to show that both of them were arrested elsewhere and not in room 1109 of the Federal Hotel and both of them were not involved in trafficking heroin with the appellant and the second accused. They were not material witnesses to the unfolding of the prosecution's case. In this connection, it is ideal to refer to the speech of Yong Pung How CJ (Singapore) in *Chua Keem Long v Public Prosecutor* at p 523. This was what His Lordship said:

> The appellant's contention was that the failure of the prosecution to adduce the evidence of those other gamblers meant that the court could presume that the evidence would have gone against the prosecution, that is that there were no such visits.
>
> Such arguments are commonly made. Commonly too, such arguments are without merit. The court must hesitate to draw any such presumption unless the witness not produced is essential to the prosecution's case. Any criminal transaction may be observed by a number of witnesses. It is not necessary for the prosecution to produce every single one of those witnesses. All the prosecution need do is to produce witnesses whose evidence can be believed so as to establish the case beyond a reasonable doubt. Out of a number of witnesses, it may then only be necessary to bring in one or two; as long as those witnesses actually produced are able to give evidence of the transaction, there is no reason why all of the rest should be called, nor why any presumption should be drawn that the evidence of those witnesses not produced would have been against the prosecution.

[109] Here, we have the evidence of SP4-the agent provocateur, implicating both the appellant and the second respondent as the drug traffickers who

trafficked in 875.2g of heroin. Through SP4, we know that both the appellant and the second accused were actively involved in selling the drugs and both of them brought the drugs to room 1109 of the Federal Hotel. The measuring scale brought by the appellant to room 1109 aggravated the culpability of the appellant. All the important, essential and material witnesses were called by the prosecution to prove the charge beyond reasonable doubt against the appellant.

[110] It is our judgment that the witnesses essential to the unfolding of the narratives were called by the prosecution. It is trite law that an adverse inference for not calling a witness cannot be drawn when there is sufficient other evidence to support the prosecution's case (*Namasiyiam & Ors v Public Prosecutor*).

[111] This appeal turns upon a finding of fact by the learned JC. The audio-visual advantage enjoyed by the learned JC cannot be enjoyed by this court. As an appellate tribunal this court should be slow in interfering with a finding of fact of the learned JC who had observed the demeanour and heard the witnesses before coming to his conclusion. On this point, the Federal Court speaking through Abdul Hamid Omar FCJ in the case of *Siti Aisha binti Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124, at p 126 aptly said:

> We hardly think so as the question for determination by the learned President was essentially one of fact. The principle that should guide an appellate court in this regard is to be found in Privy Council case of *Yahaya bin Mohamad v Chin Tuan Nam* [1975] 2 MLJ 117. This was a running down case where the crucial issue was on which side of the line the collision took place. The judge considered the evidence of witnesses, the sketch plan and police photograph and arrived at a specific finding of fact. The Privy Council held that the finding of a presiding judge should not have been disturbed. It is only in a rare case that 'an appellate court, lacking the advantage of seeing and hearing the witnesses, was justified in coming to a different conclusion from the trial Judge on the question of credibility.' We are of the same view that an appellate court may be justified in coming to a different conclusion if there is valid reason to think that the trial judge had not taken proper advantage of his having seen and heard the witnesses.

[112] Gopal Sri Ram JCA writing a separate judgment in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2006] 1 CLJ 457 (FC) had this to say at p 475 (CLJ):

> (32) Now, it (sic) (is) settled law that it is no part of the function of an appellate court in a criminal case — or indeed any case — to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lacks the audio-visual advantage enjoyed by the trial court.

[113] Raja Azlan Shah LP (as His Majesty then was) in *Public Prosecutor v Nordin bin Johan & Anor* [1983] 2 MLJ 221, succinctly said at p 222:

> The approach of an appellate court in a case like this is well established. In such a case it is its duty to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of the witnesses comes into question but with full liberty to draw its own inference from the facts proved or admitted and to decide accordingly.
>
> The question as it seems to us is whether the learned trial judge was reasonably entitled in all the circumstances to come to the conclusion he did that the two respondents were not at the scene of the crime and were not participes criminis in respect of the actual crime charged. We would answer that question in this way: that on the basis of the facts which the learned judge had found and accepted, his decision was one which any reasonable tribunal properly directed, as was done in this case, could have reached and we do not think that we ought to accede to the Public Prosecutor's argument that certain adverse inferences should be made on the evidence adduced.

[114] Ong Hock Sim FJ writing for the Federal Court in *Public Prosecutor v Lim Eng Chye* [1978] 1 MLJ 200 (FC) said (see the headnote):

> Held, dismissing the appeal: the question raised in the appeal was related to the credibility of the witnesses and as the appellate court did not have the advantage of seeing and evaluating them, as the learned judge had, it would be slow to interfere. There were also serious gaps in the prosecution evidence.

[115] Hashim Yeop Sani FJ in *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38; [1984] 1 CLJ (Rep) 207, (FC) aptly said at pp 39–40 (MLJ); p 209 (CLJ):

> We accordingly allowed leave for one question reframed by us. The question reframed reads as follows:
>
> In an appeal against acquittal from the decision of a Subordinate Court to the High Court raising only questions of fact, where there is evidence to support the defence and there has been no misdirection by the Subordinate Court can the High Court substitute its own finding for that of the Subordinate Court?
>
> This is an elementary question of law but we gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v King-Emperor* AIR 1934 PC 227 and secondly purporting to follow Terrel, Ag CJ in *Rex v Low Toh Cheng* the appellate judge went into conflict with the trend of authorities in similar jurisdictions.
>
> With respect, what Lord Russell of Killowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred 'the High Court should and will always give proper weight and consideration to such matters' as —
>
> (1) the views of the trial judge on the credibility of the witnesses;

(2) the presumption of innocence in favour of the accused;

(3) the right of the accused to the benefit of any doubt; and

(4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

Lord Reid reiterated this same principle in *Benmax v Austin Motor Co Ltd* [1955] AC 370 at p 375, where he quoted from Lord Thankerton's judgment in *Thomas v Thomas* [1947] 1 All ER 582 that:

> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate court which is disposed to come to different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

[116] An appreciation of the evidence by the trial court is of crucial importance to our delivery system in the context of criminal law. The trial court must carefully analyse and scrutinise the evidence adduced by the prosecution and the defence. The finding of facts are mainly based on the appreciation of the evidence. It is the heart and soul in our justice delivery system. That is the golden thread that runs through the web of administration of justice in a criminal case.

[117] We have perused through the appeal record with a tooth comb and mulled through the evidence. The learned JC, taking advantage of his audio-visual, had rightly appreciated the evidence of both the prosecution and the defence. We saw nothing wrong with his approach. He was right and it is safe to convict the appellant.

[118] We found no appealable error. It is our judgment that the appellant had failed to raise any reasonable doubt as to his guilt. We are satisfied that the prosecution had proved beyond reasonable doubt the charge against the appellant. We dismissed the appellant's appeal. The conviction and sentence are hereby affirmed.

Appeal dismissed.

Reported by Kohila Nesan